on the grounds that the contract was illegal, the decision cannot be justified.[19]

From the above discussion it must be apparent that the success of any attempt to balance the interests for and against a contract or combination depends absolutely upon a true valuation of the weight to be given the various considerations *in the particular case*. This, in turn, requires a determining body, able to go into the details of the business under consideration, and having its finger always upon the pulse of the commercial situation. It is obvious that a court is not, nor can be, such a body from its very nature. The seeker for an entirely satisfactory method of handling the problem must advocate that some such body should hold the scales.

DEMURRAGE CHARGES ON PRIVATELY OWNED RAILROAD CARS. — The United States Supreme Court has recently upheld the provision of the Uniform Demurrage Code[1] imposing a charge upon privately owned

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siderations in favor of combination. A great many cases appear to have taken the position that mere size, a predominant position in the business, should be enough to make a combination illegal. Whether these cases hold that such size so tends toward monopoly that *per se* it makes the combination illegal, or that the size is *prima facie* evidence of intent to exclude and that therefore unless there is rebutting evidence you have the situation of the Dunbar case, or whether they go upon a third tack and are attempting to determine the boundaries of the policy in favor of combinations, and to fix the limits of this policy, it is difficult to discover from an examination of the cases. Upon whichever of these grounds the cases rest, it would seem that one of two answers can be given to them, — either that the proposition is fallacious, which is the case in the first and second alternatives, or that the courts are not capable of going into the intricacies of business facts necessary to an accurate determination of the question and so should not make the attempt, which is the case in the first and third alternatives.

Where a combination is formed agreeing to a set price and has a predominant position in the business, there is some ground for presuming that the intention of the parties is to exclude others, and as they have the power to do so, for holding the combination illegal. But mere size, even added to a purpose to fix prices, but not setting a hard and fast price, does not justify this presumption.

[19] The agreement by the dry-cleaning company not to go into the laundry business presents an even weaker case for illegality than that by the laundry companies, so it adds nothing against the contract.

[1] The Uniform Demurrage Code was adopted in 1909 by the National Convention of Railway Commissioners, and, in the same year, endorsed by the Interstate Commerce Commission, which recommended that its rules be made effective on interstate commerce throughout the country. "These rules provide that after two days' free time 'cars held for or by consignors or consignees for loading' or unloading shall (with certain exceptions not here material) pay a demurrage charge of $1 per car per day. Private cars are specifically included by the following note: 'NOTE. — Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"'(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)'" Brandeis, J., in Swift & Co. *v.* Hocking Valley Ry. Co., U. S. Sup. Ct., Oct. Term, 1916, No. 376. See *In re* Demurrage Investigation, 19 Int. Com. Rep. 496.

railroad cars held overtime "on carrier's" tracks.[2] The defendant, Swift & Co., occupied, under a license from the plaintiff, the Hocking Valley Railway Co., a certain siding appurtenant to their local warehouse. The railroad brought this action below to recover a demurrage charge, imposed under the Uniform Demurrage Code, on cars owned by Swift & Co. which the packing company held on this siding longer than the prescribed forty-eight hour free period. The Supreme Court, in affirming a judgment for the plaintiff, upheld the charge as one imposed upon privately owned cars on "public" tracks.[3] Such charges have been repeatedly sustained by inferior federal tribunals.[4]

The car-distribution cases [5] have disposed of the private car owners' arguments that their cars are entirely without the purview of the present interstate commerce regulation, and that they should be allowed to enjoy, unrestricted, the advantages gained by their own foresight and expenditure. The principal case carries us a step further, in demanding an affirmative charge on private property rather than denying to the owner of private cars the use of carrier's equipment. But the case that because they are private cars they are to be left entirely to private manipulation, has been squarely met. Granting this, it is objected that the charge is contrary to the Act to Regulate Commerce, is unreasonable, a denial of due process of law, and void. In answer to this are urged two considerations: First, the railroad may impose a fair charge [6] on cars standing on their tracks longer than the free period allowed, for the use and occupation thereof.[7] Second, the charge operates as a penalty, tending to secure the prompt return of the cars and so to prevent congestion of terminal facilities, leaving them open for the use of other shippers.[8] These considerations alone seem to give a sufficient justification for the charge. And it has been so considered.[9]

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[2] Swift & Co. *v.* Hocking Valley Ry. Co., *supra.*

[3] The decision of the court is based squarely on this interpretation. It is, of course, unprofitable to quarrel with a finding of fact. But the opinion leaves something to be desired as to the precise ground upon which the finding was based. The question of "public" or "private" track is, of course, one of fact. But it seems that it is a fact, like the fact of negligence or proximate cause, which requires the application of legal standards to given facts. There is no inherent distinction, no magic and conclusive difference, in this connection, between a railroad track the title to which is in an individual, and one owned by a railroad corporation. The material differences seem to be these: (1) If the track is privately owned, demurrage cannot be charged as a fee for use and occupation; (2) nor can it be imposed as a regulation tending to keep terminal facilities open to the public. These distinctions have been recognized by the Commission. See *Re* Demurrage Charges on Tank Cars, 13 Int. Com. Rep. 378, 381; Cudahy Packing Co. *v.* Chicago, etc. Ry. Co., 12 Int. Com. Rep. 446, 447. Further than this, there is no valid distinction. So it is suggested that a track owned in fee by a railroad, but occupied by a private corporation under a lease giving the exclusive right of use, comes under the description of a "private" track for demurrage purposes.

[4] See *Re* Demurrage Charges on Tank Cars, *supra;* Cudahy Packing Co. *v.* Chicago, etc. Ry. Co., *supra;* National Refining Co. *v.* St. Louis, etc. Ry. Co., 237 Fed. 347, affirming 226 Fed. 257.

[5] See Interstate Commerce Commission *v.* Illinois Central R. Co., 215 U. S. 452; R. R. Comm. of Ohio *v.* Hocking Valley Ry. Co., 12 Int. Com. Rep. 398.

[6] There was no question raised as to the charge being unreasonable in amount.

[7] This reason is taken in *Re* Demurrage Charges on Tank Cars, *supra.*

[8] The decision in Cudahy Packing Co. *v.* Chicago, etc. Ry. Co., *supra,* is based on this ground.

[9] See cases cited *supra,* note 4.

A far more interesting and difficult problem is presented by that provision of the Uniform Demurrage Code imposing a charge on privately owned cars held overtime on privately owned tracks so long as they are under lading. It is contended in objection that after such cars have been removed from the interchange tracks and placed upon private tracks, they are no longer in "railroad service," but are private property in the possession of the owner, to be used as he sees fit; that the railroads have no interest in the tracks upon which the cars then stand; that they have ceased to pay rental or mileage for the use of the cars; that they are in no way responsible for the cars, and can have no interest in them until they are again placed on the interchange tracks and tendered for shipment; that they cannot require the owner to place his cars again in the railroads' service; and that if the owner so elects he may unload the car, notify the carrier, and then reload the car and use it for storage purposes as long as he sees fit, and that no possible benefit comes to either the carrier or the public through this unnecessary labor.[10]

As to the first objection, it accomplishes nothing to prove that the cars are not within "railroad service" as we ordinarily employ that term. It is used in the Code merely as a convenient phrase to describe a certain situation. Whatever the phrase used, the question still remains: Can the railroad charge demurrage against private cars in this situation?

The other arguments against the charge present two propositions: First, that a private owner of private property while on his own land may do with it what he pleases. To this need be made no further answer. Second, that the charge is arbitrary, not in return for any service rendered, and useless alike to the carrier and the public. If sound, this objection must be fatal.

It is true that the railroad cannot charge for use and occupation of its tracks, nor justify the charge on the ground that it will keep terminal facilities open to the public. But it is submitted that the charge may be upheld, first, because it tends to prevent an unjust advantage from accruing to those who own their own cars over those who do not; [11] and second, because the railroads impose the charge as a condition to accepting privately owned cars.[12]

There are two substantial possibilities wherein owners of private cars may receive an advantage over other shippers. First, in unloading, they may team directly from the car as the product is sold, while another shipper must either unload the entire car first, and re-handle it in delivery lots later, or pay demurrage. A demurrage charge on the private car owner puts them on the same basis. Either may let the car stand and pay demurrage charges, or may unload at once. Second, in receiving carriers' equipment, one owning private cars may use his cars, fill them and set them on his own siding, treat them as storage cars and not cars

[10] These are the principal objections urged by the complainant in Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., 19 Int. Com. Rep. 556, 557.

[11] See Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., 19 Int. Com. Rep. 556.

[12] This right of the railroad has been repeatedly asserted in the cases. See Cudahy Packing Co. *v.* Chicago, etc. Ry. Co., *supra; Re* Demurrage Charges on Tank Cars, *supra;* Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., *supra;* Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., 188 Fed. 221.

in commerce, and demand his share of railroad-owned cars, to the prejudice of other shippers. This is another aspect of the very evil the car-distribution cases sought to correct. The argument taken that the demurrage charge would not prevent this discrimination because the shipper could unload the cars, notify the carrier, and then re-load, and use them for storage purposes as long as he cared to, and call for his share of the carriers' equipment, excluding his own from consideration, is not fatal.[13] A regulation need not fail because it is not a perfect panacea for the evil it seeks to correct. It is sufficient that it in fact tends toward a substantial improvement — places some substantial obstacle against this evil. The very fact that the shipper must go through this "useless labor" is a practical answer to the objection. By imposing the charge the shipper, as a practical matter, is very likely to return the cars promptly to railroad service.

Further, there seems no sufficient answer to the proposition that the carrier, since he is under no common-law or statutory duty to receive private cars when tendered, may impose upon his acceptance the condition that the shipper pay this demurrage charge. This condition may properly be implied from the fact that the railroad in its tariff published with the Interstate Commerce Commission regarding the use of privately owned cars includes both the rental they will pay the owner, and the charge they will impose as demurrage. The shipper cannot accept a part and reject the remainder. Nor is this an unreasonable condition. It enables the railroad to count with a degree of certainty upon the continued use of privately owned cars, and to regulate its own equipment upon this basis, for the better service to the general shipping public.

To the objection that the charge is contrary to the Act to Regulate Commerce, it may be answered that "surely any arrangement for the use of private cars which causes, or results in, undue preference or unjust discrimination is repugnant to the underlying principle, as well as in conflict with the terms, of the act." [14] It may be suggested, further, that Swift & Co., by placing their cars in railroad service, have entered, with the carrier, into the joint business of supplying interstate railway facilities, and, as such, have come definitely within the scope of the Act.

RECENT CASES

BILLS AND NOTES — DISCHARGE OF INDORSERS — EXTENSION AGREEMENT WITH THIRD PARTY. — The holder of a note indorsed for accommodation deposited the note after maturity as collateral for an unmatured obligation owed to a third person. Section 120 of the Negotiable Instruments Law provides for the discharge of an indorser "*by any agreement binding on the holder* to extend the time of payment or to postpone the holder's right to enforce the instrument." The holder later sues an accommodation indorser. *Held*, that he may recover. *Brosemer* v. *Brosemer*, 162 N. Y. Supp. 1067 (Sup. Ct., Oswego Cty.).

[13] This objection prevailed in Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., 188 Fed. 221; but the court upheld the charge on the second ground indicated above.

[14] Quoted from the opinion of the Commission in Proctor & Gamble Co. *v.* Cincinnati, etc. Ry. Co., 19 Int. Com. Rep. 556, 558.